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No. 381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NORTHWESTERN PACIFIC RAILROAD COMPANY, *Appellant*,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

and

CITY OF SAN RAFAEL, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Northern District of California, Southern Division

JURISDICTIONAL STATEMENT

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On Appeal from the United States District Court for the Northern District of California, Southern Division

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JURISDICTIONAL STATEMENT

Appellant, Northwestern Pacific Railroad Company, appeals from the judgment of the United States District Court for the Northern District of California, Southern Division, entered April 17, 1964, dismissing

appellant's complaint to set aside an order of the Interstate Commerce Commission, dated May 22, 1963, denying Northwestern Pacific Railroad's request to abandon 2.465 miles of railroad line in Marin County, California. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 228 F. Supp. 690. A copy of the opinion and judgment is attached hereto as Appendix A. A copy of the report and order of the Interstate Commerce Commission in *Northwestern Pacific Railroad Company Abandonment Between San Rafael and Forbes Overhead (Puerto Suello Tunnel), Marin County, California*, 320 I.C.C. 19 (1963), is attached hereto as Appendix B. A copy of the report and order recommended by the Hearing Examiner is attached hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U.S.C. Section 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on April 17, 1964, and notice of appeal was filed on June 15, 1964. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial

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[1] In the decision of the Interstate Commerce Commission (320 I.C.C. 20), it was set forth:

> "We are in accord with the examiner's findings of fact and ultimate conclusions thereon, which we adopt as our own and will not restate except to the extent necessary for clarity or amplification . . .

Code, 28 U.S.C. Section 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Colorado* v. *United States*, 271 U.S. 155 (1926), *United States* v. *State of Idaho*, 298 U.S. 105 (1936), *United States* v. *Hancock Truck Lines*, 324 U.S. 774 (1945).

STATUTES INVOLVED

Section 1 (18-21) of the Interstate Commerce Act, 49 U.S.C. 1 (18-21) is set forth verbatim in Appendix D hereto.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission erred in holding a railroad must rebuild a burnt out tunnel at substantial expense, where the cost will exceed two years' net revenue, when the railroad business in the area is declining, and in a territory that has little or no industrial or carload future.

2. Whether the District Court correctly held the constitutional fact doctrine of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287 (1920), is not applicable, and whether the District Court correctly held the order of the Commission is not confiscatory.

3. Whether the net loss doctrine is applicable where the past and present revenues are considered, in view of the future lack of potentials in that the railroad business in the area involved in the abandonment has been declining, there is little or no industrial future, and where alternate means of transportation service is available or provided.

4. Whether the parent company, Southern Pacific Company that already has advanced over $48,000,000

to keep the appellant Northwestern Pacific Railroad Company in operation, can be excluded from the picture, when substantial sums of money must be advanced to rebuild the tunnel in question.

5. Whether the Interstate Commerce Commission can require the railroad to rebuild the burnt out tunnel and maintain a route for the benefit of another railroad, The Atchison, Topeka and Santa Fe Railway Company:

(a) when the Santa Fe route that connects with appellant's is uneconomic; and

(b) when there was no obligation for all time to maintain through routes and joint rates.

6. Whether the District Court correctly applied the tests enumerated in *Universal Camera Corp. v. Labor Board*, 340 U.S. 474 (1951), in determining:

(a) there is a continuing need for rail service in the area affected:

(b) the abandonment would adversely affect the shipping public;

(c) no long-run losses would be incurred by appellant in its overall system;

(d) that appellant is financially able to restore the tunnel;

(e) in omitting to include as one of the relevant matters the cost of reconstructing the railroad due to the relocation and expansion of the adjacent state freeway, omitting to apply the doctrine of *Purcell v. United States*, 315 U.S. 381 (1942).

STATEMENT

Appellant is operating a railroad in interstate commerce in California from a point near the Oregon border along the coastal area of northern California to San Francisco Bay. From the north, the line runs south to Ignacio, a town in northern Marin County, approximately twenty-five miles north of San Francisco. At Ignacio the line splits, and before the tunnel fire most of the freight cars were routed from Ignacio to Schellville, a town on the northern edge of San Francisco Bay, where appellant interchanges cars with its parent Southern Pacific Company, which in turn interchanges cars with other railroads including the Atchison, Topeka and Santa Fe Railway Company at various places. The other branch of appellant's line runs south from Ignacio, through Tunnel No. 4 (also known as Suello Tunnel) to Tiburon, a point directly across the Bay and north of the City of San Francisco. At Tiburon the Atchison, Topeka and Santa Fe Railway ferries the cars by barge to either Richmond in the East Bay area or to San Francisco. On July 20, 1961, two juveniles set fire to Tunnel No. 4, and as far as can be determined, the entire tunnel was destroyed by cave-ins. The tunnel was one of two routes to southern Marin County, the other being the Santa Fe barge system via Tiburon. Since the fire, rail service to and from the area south of the tunnel has been exclusively by means of the Santa Fe ferry to Tiburon where cars are interchanged with appellant. From the point of tunnel collapse to Tiburon is approximately 10.5 miles. Only freight operations are conducted in the area in question.

On August 21, 1961, appellant requested the Interstate Commerce Commission under section 1(18)-(21)

of the Interstate Commerce Act for authority to abandon the burnt out tunnel and its approaches.

On September 17, 1962, the report and order recommended by the hearing examiner was served, recommending that the application be denied (Appendix C).

Thereafter, on May 22, 1963, the Interstate Commerce Commission issued its decision which was served June 5, 1963, denying the application of appellant to abandon the portion of its line in question. The decision is reported at 320 I.C.C. 19 (Appendix B).

The appellant then filed an action in the District Court to set aside the order of the Interstate Commerce Commission which order denied appellant's request to abandon the burnt out tunnel and its approaches. The District Court denied the petition to enjoin, annul and set aside the order of the Commission, and dismissed the complaint. (Appendix A)

The unusual feature of this matter is that the tunnel collapse has occurred and the line in question exists and is serving people as it will continue to exist and serve people if the application to abandon is granted. This is the opposite of the ordinary abandonment case. The other phase of this situation is that substantial sums of money will have to be expended to rebuild the tunnel if the Commission's order denying abandonment stands, and this phase of the matter brings into focus the substantial questions discussed hereafter.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are of substantial importance to the Commission's administration of the Interstate Commerce Act and its approach to rail abandonments. The questions presented are of vital economic significance to the railroad industry.

The burning and collapse of the tunnel (10½ miles north of Tiburon) in the mountain pass immediately north of San Rafael was a serious matter. The cost to rebuild the tunnel will exceed $850,000, and exceed the previous two years' net revenue of appellant. The Interstate Commerce Commission sustained its order that the line should not be abandoned by finding that the segment of the railroad in question was operating at a small profit. This finding was based on the operations of the three years preceding the tunnel fire. The Commission and Court have looked only to the past revenues and business, not the future potential, or as appears in this matter, the fact that there is little or no industrial or carload future.

The question of prime importance to the railroad industry is whether the Interstate Commerce Commission and the Courts may ignore and disregard the economic future. The District Court found the area served, "is primarily a residential suburb of San Francisco, consisting of many small towns and villages." (228 F. Supp. 692.) The evidence was uncontradicted, the land values are too high to attract carload industries or shippers, and the amount of carload business was decreasing in the preceding three years.

The Commission in its decision took the revenue of the whole system, not the area where the line was sought to be abandoned, and said the system revenue of previous years was an "indication that the need for transportation in the area is not undergoing an immediate decline." (320 I.C.C. 23.) If such a doctrine is true, and it is not, then no portion of a line could ever be abandoned of a railroad where there was a system net. (See *Colorado* v. *United States*, 271 U.S. 153 (1926), and *Southern Railway Co.* v. *North Carolina*, 376 U.S. 93 (1964)).

The Commission in using only past system revenues to determine if a particular segment of the line is undergoing a decline, and ignoring specific evidence on the subject to the contrary was not only unsound but is of serious concern to all railroads.

There was a considerable volume of lumber and related products that moved from north of the tunnel to south of the tunnel to Tiburon where the cars were interchanged by appellant with appellee The Atchison, Topeka and Santa Fe Railway Company. Since the tunnel fire, these cars have been handled by appellant to Schellville where they are interchanged with the Southern Pacific Company, and then thereafter with appellee The Atchison, Topeka and Santa Fe Railway Company at various railroad junctions. The sole evidence was that the Tiburon interchange route was an uneconomic route for the appellee Santa Fe. It is of particular importance to the railroad industry to ascertain if substantial sums of money must be spent by one railroad to maintain an uneconomic route of another carrier.

Generally the only shippers or receivers of freight that are affected are three rock, sand and gravel operators, and some small lumber yards, who were using the rail service from north of the tunnel to south of the tunnel before the tunnel fire. The issue is whether they should be required to use, as they are now using, alternate truck service. Likewise, should the tunnel be rebuilt for their convenience where it appeared they were considering moving their businesses because of the proposed widening of an existing freeway and the change of the building pattern, that they were not wedded to the rails, and either had before, or at the time of the tunnel fire, were using alternate truck

service, and, of course, have used truck service since the tunnel fire.

The Court and Commission found by looking to the past the line sought to be abandoned was making some profit. However, if the tunnel is required to be rebuilt, the cost will exceed the previous two years' net revenue of the whole railroad, and several more times that ratio of the line sought to be abandoned. Thus, if the application to abandon is denied and the tunnel is rebuilt, the result will be a serious deficit situation. The appellant is already in debt to its parent Southern Pacific Company of a sum exceeding $48,000,000. To expend money to rebuild the tunnel will result in a complete absence of available money for any additions and betterments, new cars, locomotives, etc.

The District Court did not correctly apply the tests enumerated in *Universal Camera Corp. v. Labor Board*, 340 U.S. 474 (1951), in that it failed to take into consideration the evidence there was little or no industrial or carload future in the area in question, and failed to apply the constitutional fact doctrine of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

Likewise, the Commission's application of the entire system's revenues and expenses to the line in question was an improper application of the overall prosperity of the carrier to the burden of the particular line sought to be abandoned (*Southern R. Co. v. North Carolina*, 376 U.S. 93 (1964)).

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the District Court be reversed and the case

remanded to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

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670 Pacific Electric Building
610 South Main Street
Los Angeles, California 90014
Attorney for Appellant

CERTIFICATE OF SERVICE

I, RANDOLPH KARR, attorney for Northwestern Pacific Railroad Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of August, 1964, at Washington, D. C., I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with first-class postage prepaid to The Solicitor General, William H. Orrick, Jr., Esq., Assistant Attorney General, and John H. D. Wigger, Esq., Attorney, Department of Justice, Washington 25, D. C., and with airmail postage prepaid to Cecil F. Poole, Esq., United States Attorney, for the Northern District of California, at Room 422 Post Office Building, San Francisco, California.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, and Robert S. Burk, Esq., its Attorney, Interstate Commerce Commission, Washington 25, D. C.

3. On the Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California; County of Marin; Marin

Industrial Development Foundation; Camgros Gravel and Fuel Co., Inc; Chris Craft Sales of San Rafael; Colonial Wax Products Corporation of California; Golden Gate Distributing Company; Henry Hess Company; California Newspapers, Inc. (San Rafael Independent Journal); McPhail Fuel Co.; PBM Inc.; Rice Supply, Inc.; A. G. Schoonmaker Co.; Service Lumber Co.; and Shamrock Materials, Inc., intervening defendants; by mailing copies in a duly addressed envelope, with airmail postage prepaid to their respective attorneys of record:

Graham, James & Rolph,
Boris H. Lakusta, Esq.
E. Myron Bull, Jr., Esq.
310 Sansome Street
San Francisco 4, California

4. On The People of the State of California and The Public Utilities Commission of California, intervening defendants, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to their respective attorneys of record:

Richard E. Tuttle, Esq.
Hector Amminos, Esq.
State Building
San Francisco, California

and The Atchison, Topeka and Santa Fe Railway Company, intervening defendant, by mailing copy in duly addressed envelope, with airmail postage prepaid, to its attorney of record:

Frederick G. Pfrommer, Esq.
114 Sansome Street
San Francisco, California.

RANDOLPH KARR

APPENDIX A

NORTHWESTERN PACIFIC RAILROAD COMPANY, *Plaintiff*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*,

AND

CITY OF SAN RAFAEL, ET AL., PUBLIC UTILITIES COMMISSION, ET AL., AND ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Intervening Defendants.*

Civ. No. 41639.

United States District Court
N. D. California, S. D.

April 17, 1964.

Action to set aside an order of the Interstate Commerce Commission which denied plantiff's request to abandon a portion of railroad line, wherein several parties intervened. The United States District Court for the Northern District of California, Southern Division, comprised of three judges, Per Curiam, held, inter alia, that substantial evidence supported Commission's findings that there was continuing need for rail service in area affected, that abandonment would adversely affect shipping public, that no long-run losses would be incurred by railroad in its overall system, and that railroad was financially able to restore destroyed tunnel.

Petition denied.

Randolph Karr, Frederick E. Fuhrman, Harold S. Lentz, San Francisco, Cal., for plaintiff Northwestern Pacific R. Co.

William H. Orrick, Jr., Asst. Atty. Gen., John H. D. Wigger Atty., Dept. of Justice, Washington, D. C., Cecil F. Poole, U. S. Atty., San Francisco, Cal., for the United States.

Robert W. Ginnane, Gen. Counsel, H. Neil Garson, Associate Gen. Counsel, Robert S. Burk, Atty., Interstate Commerce Commission, Washington, D. C., for Interstate Commerce Commission.

Graham, James & Rolph, Boris H. Lakusta, E. Myron Bull, Jr., San Francisco, Cal. for intervening defendants Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California; County of Marin; Marin Industrial Development Foundation; Camgros Gravel and Fuel Co., Inc.; Chris Craft Sales of San Rafael; Colonial Wax Products Corporation of California; Golden Gate Distributing Company; Henry Hess Company; California Newspapers, Inc. (San Rafael Independent Journal); McPhail Fuel Co.; PBM Inc.; Rice Supply, Inc.; A. G. Schoonmaker Co.; Service Lumber Co.; and Shamrock Materials, Inc.

Richard E. Tuttle, Hector Anninos, San Francisco, Cal., for intervening defendants The People of the State of California and The Public Utilities Commission of California.

Frederick G. Pfrommer, San Francisco, Cal., for intervening defendant Atchison, Topeka and Santa Fe R. Co.

Before BROWNING, Circuit Judge, and SWEIGERT and ZIRPOLI, District Judges.

PER CURIAM.

This action involves the petition of Northwestern Pacific Railroad to set aside an order of the Interstate Commerce Commission which denied Northwestern's request to abandon 2.465 miles of railroad line in Marin County, California. There are two major issues for consideration. First, plaintiff Northwestern Pacific contends that this Court should exercise its own independent judgment on the law and the facts pursuant to the "constitutional fact" doctrine as announced in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S. Ct. 527, 64 L.Ed. 908 (1920). Second, plaintiff contends that even if the Court refuses to make an independent judgment, the record does not contain substantial evidence to support the findings of the Commission as required by 5 U.S.C. § 1009(e). The Court has con-

cluded that the "constitutional fact" doctrine does not apply to this case, and that, viewing the record as a whole, the findings of the Commission are supported by substantial evidence.

Plaintiff's railroad system extends from a point near the Oregon border along the coastal area of northern California to San Francisco Bay. From the north, the line runs south to Ignacio, a town in northern Marin County, approximately twenty-five miles north of San Francisco. At Ignacio the line splits, so that cars may be routed from Ignacio to Schellville, a town on the northern edge of San Francisco Bay, where plaintiff has a hookup with the Southern Pacific system. The other branch of the line runs south from Ignacio, through the Puerto Suello Tunnel to Tiburon, a point directly across the Bay and north of the City of San Francisco. At Tiburon the Atchison, Topeka and Santa Fe Railway ferries the cars by barge to either Richmond in the East Bay area or to San Francisco. It should be noted that the portion of Marin County south of the tunnel, which is the area that is the subject matter of this lawsuit, is primarily a residential suburb of San Francisco, consisting of many small towns and villages. On July 20, 1961 two juveniles set fire to the Puerto Suello Tunnel, and as far as can be determined, the entire tunnel was destroyed by cave-ins. The tunnel was the only rail route to southern Marin County, except for the Santa Fe barge system. Since the fire, rail service to and from this area has been exclusively by means of the Santa Fe Ferry and has been reduced from daily to twice a week service.

On August 21, 1961 Northwestern Pacific filed an application with the Interstate Commerce Commission for the grant of a certificate of public convenience and necessity under § 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), authorizing abandonment of two and one half miles of track in Marin County north of San Rafael. This section of track is primarily the Puerto Suello Tunnel. It should be noted that petitioner is not asking that it be per-

mitted to abandoned the entire operation in Marin County, but only the means of access to southern Marin from the northern portion of its line. Protests to the application were filed by several cities, industries, and development groups in the area affected, seven railway labor organizations, the Atchison, Topeka and Santa Fe Railway, and the State and Public Utilities Commission of California. On September 17, 1962 the hearing examiner filed his report and concluded in part as follows:

> "Upon consummation of the proposed abandonment, rail transportation service between NWP points south of the tunnel, on the one hand, and, on the other, *interstate* and intrastate points on the lines of other railroads would be confined to routes via Tiburon. Rail service between NWP points north of the tunnel and points on the lines of other railroads would be confined to the one route via Schellville. Local service between NWP points would be divided into two segments, one north of the tunnel and the other south thereof. With restoration of the tunnel, there will continue to be available as to all NWP points the through routes via both Schellville and Tiburon and the breaking of applicant's main line at the tunnel will be avoided. NWP apparently is able, financially and otherwise, to restore the tunnel and upon basis of its own revenue and expense figures will realize net revenues from continued operation through the tunnel that will justify reconstruction of the tunnel and the resumption of service through it. Clearly, no burden upon *interstate* commerce will result from reopening of the tunnel when the matter is considered from the standpoint of NWP as an individual corporate entity. The through route maintained by NWP and Santa Fe via Tiburon reflects a material and valuable contribution to the *interstate* and intrastate transportation system in the area. It is demonstrated that such system is capable of affording daily service by railroad at NWP main line points when both of the major roads connecting with NWP have opportunity to compete for the involved traffic. The collapse of the tunnel already has forced service curtailments at points south of the tunnel with a re-

sumption of daily service apparently dependent upon whether the traffic flow which formerly obtained via Tiburon can be reactivated. Failure in this respect, aside from inability to restore daily service, also renders possible further deterioration in service. As argued by certain protestants, accomplishment of the proposal would leave south of the tunnel site an uneconomic 'island' system with limited, roundabout and unsatisfactory access by water only, which most assuredly would be expected to deteriorate further, both physically and in financial results until it becomes itself a burden upon *interstate* commerce and a legitimate candidate for abandonment. The beneficiary of the abandonment apparently would be applicant's stockholder and connecting carrier, Southern Pacific Company, who would realize as its principal benefit the liquidation or diminution of carrier competition. It further appears that the increase in gross revenues likely to accrue to Southern Pacific Company as a result of the proposed abandonment would not exceed the sum of the anticipated decrease in revenues by NWP and the estimated loss in revenues by Santa Fe, the effects being that the carriers serving the area would not as a group realize any net gain and the shipping public would be left with fewer facilities for rail transportation and materially less efficient and less frequent service." (Italics supplied)

Following the examiner's report, the plaintiff petitioned the Commission for a review of the examiner's findings. On May 22, 1963 the Commission (Division 3) entered its report sustaining the examiner's findings and order. Plaintiff's petition for a finding that an issue of general transportation importance was involved requiring consideration by the entire Commission was denied by order of July 5, 1963. 320 I.C.C. 19.

Plaintiff filed its complaint to set aside the order of the Commission in this Court on July 19, 1963. The motions of the State of California, the Public Utilities Commission of California, the Santa Fe Railway, and several civic and industrial groups in Marin County to intervene as defendants

were granted. On October 25, 1963 the Chief Judge of the Ninth Circuit ordered that a three judge district court be convened to hear plaintiff's petition, pursuant to the provision of § 2284, Title 28 United States Code.

Plaintiff's first contention that this Court must make an independent judgment on the facts is predicated on its contention that the Commission's order unduly burdens interstate commerce and is unconstitutionally confiscatory. Three cases have imposed a constitutional requirement on the law and facts where it is claimed that administrative action is in violation of constitutional rights. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908 (1920); Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932); Ng Fung Ho v. White, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938 (1922). Although there is some doubt as to whether the constitutional fact doctrine has any validity today, see Davis, Administrative Law Treatise, § 29.00, the Court concludes that even if it does have validity, the present record does not merit its utilization.

[1, 2] In rate review cases, it is clear that agency action is not unconstitutional unless it results in a confiscation of property without just compensation. A rate is confiscatory only if it results in an over-all loss of net profits to the petitioning railroad; that is, the Commission may adopt a rate schedule which renders the particular service unprofitable to the railroad, but as long as there is not a net loss to the entire system, there is no confiscation. In regard to confiscation, the Supreme Court held in B. & O. R. Co. v. United States, 345 U.S. 146, at 148, 73 S.Ct. 592 at 593, 97 L.Ed. 912 that:

> "So long as a railroad is not caused by such regulations to lose money on its over-all business, it is hard to think that it could successfully charge that its property was being taken for a public use 'without just compensation.' And apparently the railroads rely not on the just compensation but on the Due Process provision of the Fifth Amendment."

Although we have not found a single case in which the Supreme Court has held that the confiscation standard of constitutional agency action applies to abandonment as well as rate cases, the Court in the recent case of Southern R. Co. v. North Carolina (United States v. North Carolina), 84 S.Ct. 564, 571, had occasion to review the standards to be applied by the Commission an abandonment cases. The Court said:

> "This Court has long recognized that the Commission may properly give varying weights to the overall prosperity of the carrier in differing situations. Thus, in Colorado v. United States, 271 U.S. 153 [46 S.Ct. 452, 70 L.Ed. 878], which also involved a situation in which the Commission was required to balance public convenience and necessity against undue burdens on interstate commerce, it was specifically noted that 'In many cases, it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation.' In many cases * * * the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier.' 271 U.S., at 168-169 [46 S.Ct. at 456, 70 L. Ed. 878]. *In cases falling within the latter category, such as those involving vital commuter services in large metropolitan areas where the demands of public convenience and necessity are large, it is of course obvious that the Commission would err if it did not give great weight to the ability of the carrier to absorb even large deficits resulting from such services.* But where, as here, the Commission's findings make clear that the demands of public convenience and necessity are slight and that the situation is, therefore, one falling within the first category delineated in Colorado, it is equally proper for the Commission, in determining the existence of the burden on interstate commerce, to give little weight to the factor of the carrier's overall prosperity." (Italics supplied)

[3] From the above languages we have no reason to think that the Supreme Court would not adopt the same standard of confiscation for abandonment cases that it has adopted for rate cases. Consequently, we hold that no confiscation results from an order of the Interstate Commerce Commission denying the abandonment of rail services which are shown to be unprofitable, as long as there is no net loss to the over-all system.

Turning to the evidence on this point, we find that there is no evidence that the order requiring reconstruction of the tunnel would result in a net loss to Northwestern Pacific. The plaintiff indicates that it is a wholly owned subsidiary of the Southern Pacific Company. We find that it is unnecessary to consider whether plaintiff should be treated as part of the Southern Pacific Company or as an independent entity for the purpose of determining whether a net loss amounting to a confiscation resulted from the order in question because there is no confiscation under either theory. The evidence clearly establishes that no net loss would result if we consider the effect of the reconstruction of the tunnel on the entire Southern Pacific system. The evidence further supports the findings of the examiner that plaintiff, if considered as a separate entity, on the basis of its own revenue and expense figures, will realize net revenues from continued operation through the tunnel. Since the question is actually one of degree of profits as opposed to over-all net loss, the only remaining issue is whether there is substantial evidence in the record to support the findings of the examiner.

In arguing that the findings of the Commission are not supported by substantial evidence, plaintiff accuses the Commission of a "gross misunderstanding of what the case is about." This accusation is predicated upon that portion of the decision of Division 3, (320 I.C.C. 19; page 22 which reads as follows:

> "The original route via the tunnel is 17 miles from Ignacio to Tiburon and approximately 6 miles via

ferry to Richmond or a total of 23 miles. The proposed alternate route, over which traffic north of the tunnel is presently moving, via Ignacio, Schellville, and Fairfield to Richmond, is 79 miles and thus approximately 240 percent more circuitous than the route via the tunnel and ferry. This alternate route has always been available to shippers on applicant's line. *However, out of 15,095 carload shipments handled by applicant in 1959 between main line points south of the tunnel (including San Francisco) on the one hand, and main line and branch points north of the tunnel on the other, some 10,024 carloads were interchanged at Tiburon.* In 1960 7,948 out of 12,124 cars used the Tiburon gateway and for the first 5 months of 1961, 3,324 out of 5,117 cars used that point of interchange. Obviously, the cars routed via the Tiburon gateway would not have moved over that route unless it was the most efficient route for those particular cars. The substantial number of cars that utilized the Tiburon gateway in the 2 years and 5 months prior to the fire and the circuity of the *alternate route to the San Francisco area* convinces us that the traffic involved cannot be handled as efficiently via the alternate route as by way of the Tiburon gateway." (Emphasis supplied by plaintiff)

Plaintiff contends that the above quoted language of the Commission clearly shows that it misconceived the nature of the traffic involved and did not appreciate that most of the 10,024 cars interchanged at Tiburon moved to or from destination *outside* the area described by the Commission. We do not so interpret the language of the Commission and are satisfied that it understood the nature of the traffic involved. The Commission understood that 10,024 cars were *interchanged* at Tiburon, and that these cars did not necessarily involve movements only to or within the San Francisco area. We find no confusion in the statement of the Commission which would justify a remand.

The Commission itself at one point speaks of traffic between points on the northern segment and the San Francisco terminal area and *beyond*, thereby indicating it has no limited understanding of the nature of the traffic in-

volved. Furthermore, it adopted as its own the examiner's findings of fact and ultimate conclusions, which findings set forth the *interstate* character of the traffic involved and also specifically state "With the handling by Southern Pacific via Schellville of all traffic from and to NWP points north of the tunnel, the shippers would be able to route traffic in the line-haul service of Santa Fe beyond Stockton, Fresno or Bakersfield, Calif." These three cities are clearly beyond the San Francisco Bay area.

[4, 5] Bearing in mind the tests enunciated in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), we have concluded from a full review of the entire record that the Commission's order must stand. The record is lengthy, and it would serve no useful purpose to outline the testimony of numerous witnesses and the data contained in several exhibits or to point out the various conflicts therein. We merely state that there is substantial evidence to support the examiner's findings that there is a continuing need for rail service in the area affected: that abandonment would adversely affect the shipping public; that no long-run losses would be incurred by plaintiff in its over-all system; and that plaintiff is financially able to restore the tunnel. Under these circumstances, the weight to be given to the evidence and the various factors comprising the public convenience and necessity are for the Commission. Southern R. Co. v. North Carolina (United States v. North Carolina), 84 S.Ct. 564 (1963).

The petition to enjoin, annul and set aside the order of the Commission is denied, and the complaint is dismissed.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 21725

NORTHWESTERN PACIFIC RAILROAD COMPANY ABANDONMENT BETWEEN SAN RAFAEL AND FORBES OVERHEAD (PUERTO SUELLO TUNNEL), MARIN COUNTY, CALIF.

Decided May 22, 1963

Public convenience and necessity found not shown to permit abandonment by Northwestern Pacific Railroad Company of a portion of its main line of railroad in and north of San Rafael, Marin County, Calif. Application denied.

Randolph Karr and *Harold S. Lentz* for applicant.

William M. Bennett: Hector Anninos, Donald B. Day, Boris H. Lakusta, E. Myron Bull, Frederick G. Pfrommer, William V. Ellis, E. A. McMillan, Leonard M. Wickliffe, Charles R. McGowan, James J. Corcoran, J. G. Black, Wallace L. Kaapke, Noel Dyer, Malcolm Barrett, Marvin J. Colangelo, Robert M. Ivie, E. Warren McGuire, J. E. Howe, and *Warren P. Marsden* for protestants and interested parties.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, MURPHY, AND TUCKER

TUCKER, *Commissioner:*

Exceptions were filed by applicant to the report and recommended order of the hearing examiner recommending denial of the application, and replies to said exceptions were filed by the California Public Utilities Commission, The Atchison, Topeka and Santa Fe Railway Company

(Santa Fe), and certain affected communities and shippers, all protestants. The case has been argued orally.

By application filed August 21, 1961, the Northwestern Pacific Railroad Company requests authority to abandon that portion of its main line between milepost 17.068 at San Rafael and milepost 19.533, near Forbes Overhead, approximately 2.465 miles, in Marin County, Calif. A hearing was held at which the application was opposed by the State and Public Utilities Commission of California, Cities of San Rafael, San Anselmo, Fairfax, and Sausalito, Calif., County of Marin, Marin Industrial Development Foundation, 11 shippers, the Santa Fe, and 7 railway labor organizations. Appearances as interested parties were entered on behalf of Bay Area Rapid Transit District, Garcia Traffic Service, United Vintners, Inc., County Council of Marin County, and the California Department of Public Works. Briefs were filed and a report and recommended order of the hearing examiner were served. We are in accord with the examiner's findings of fact and ultimate conclusions thereon, which we adopt as our own and will not restate except to the extent necessary for clarity or amplification. However, we believe that our views should be set forth in certain respects.

The portion of line which applicant seeks to abandon forms an intermediate segment of its main line extending from Eureka, Calif., southward via Ignacio and Detour to Tiburon, Calif., a distance of approximately 276 miles. A branch line extends from a connection at Detour to Sausalito. Both the latter point and Tiburon are located on the northern shoreline of San Francisco Bay and at Tiburon applicant connects with the car ferry of the Santa Fe for the movement of freight to the San Francisco terminal area. Approximately 1,357.6 feet of the involved segment are located in the Puerto Suello Tunnel which was destroyed by fire on July 20, 1961, resulting in the original line becoming two disconnected segments, the portion north of the tunnel constituting approximately 97 percent thereof. No passenger service has been rendered over the line since

November 12, 1958. Freight operations of applicant both prior and subsequent to the tunnel destruction have been detailed in the examiner's report. It is sufficient to state that applicant has continued operations over each of the separated segments. Traffic between points on the northern segment and the San Francisco terminal area and beyond has been rerouted over applicant's Ignacio-Schellville branch. At Schellville interchange is made with applicant's parent, the Southern Pacific Company (Southern Pacific), which can handle the traffic into the San Francisco area. Traffic between points on the southern segment and the San Francisco terminal area continued to be handled via the car ferry. The elimination of traffic from the north, however, has decreased movements over the southern segment to the extent that service thereon has been curtailed to twice weekly and the car ferry service has been correspondingly reduced. Rebuilding the tunnel would involve an estimated minimum expenditure of $851,655 if reinforced concrete is used.[1]

The examiner found that had the tunnel been closed in 1959, 1960, and the first 5 months of 1961, and had applicant conducted its operations during those periods as at the present time with the Southern Pacific's participation, the Southern Pacific System would have derived gains in net income therefrom in the amounts of $58,265, $33,722, and $21,476. He is of the opinion, however, that the only beneficiary of the abandonment would be the Southern Pacific through such increased profits and through the liquidation or diminution of carrier competition by the Santa Fe. He pointed out (1) that applicant had net railway operating incomes for the past 5 years and the first 5 months of 1961 of $649,374, $532,441, $712,505, $1,272,231, and $261,287, respectively; (2) that applicant is apparently able financially and otherwise to restore the tunnel, and upon the basis of its own revenue and expense figures will realize net revenues

[1] Applicant collected $200,720 in insurance because of the tunnel fire on a "$500,000 deductible" policy.

from continued operation through the tunnel that will justify its reconstruction; and (3) that past operations have demonstrated the through route maintained by applicant and Santa Fe via Tiburon is capable of affording shippers on the line with daily service. On the other hand, should the abandonment be authorized, shippers on the northern segment would be confined to the one route via Schellville and would be deprived of local service to points on the southern segment. Shippers on the latter segment would be deprived of local service to points north of the tunnel, of the additional interchange point of Schellville, and of a daily service.

In its exceptions and on oral argument applicant primarily argues (1) that the transition of the territory south of the tunnel from an agricultural and industrial area to a residential area and the reduction in rail traffic does not justify the expenditure necessary to reopen and reconstruct the tunnel; (2) that the major portion of the service formerly rendered on the original line continues to be rendered adequately, expeditiously, and with more profit to the system without the use of the tunnel; (3) that it should not be required to make the necessary reconstruction expenditures simply to allow the Santa Fe's continued participation in the through traffic, and (4) that reactivation of the tunnel will create an additional expenditure of an estimated $500,000 to the State when expanding the existing parallel freeway. It is applicant's view that reconstruction of the tunnel under the circumstances, would require an uneconomic and wasteful expenditure of funds.

To support its view applicant has cited *Southern Pac. Co. Abandonment*, 267 I.C.C. 278, and Finance Docket No. 20425, *Missouri Pac. R. Co. Abandonment* (not printed), decided April 22, 1959. The circumstances in the cited cases are not dissimilar to those involved in *Confluence & O. R. Co. Abandonment*, 247 I.C.C. 399, decided July 31, 1941, wherein the Commission, on reargument, permitted abandonment of a line approximately 20 miles in length between Confluence-Oakland Junction, Pa., and Kendall, Md. It served no large

industries except a coal mine which furnished sufficient traffic to support rail transportation facilities. Abandonment of the line was permitted for the sole reason that a large part of the branch would be inundated as the result of a Government flood-control project, thus depriving the coal mine of a rail outlet. The coal mine was found to be of minor importance compared with the benefits that would accrue to the public from the operation of the reservoir and considering that it would cost between $2 million and $2.5 million to relocate the line to serve the coal mine, having an estimated value of about $300,000, the Commission concluded, in effect, that relocation of the line was not justified and would be an economic waste. This decision was affirmed in *Purcell* v. *United States*, 315 U.S. 381.

The instant proceeding differs in that no superior benefits are to be derived by the public through abandonment of the segment in question. While there is some evidence that abandonment might result in a savings to the State when expanding the parallel freeway, no definite plan or schedule for such expansion has been adopted by highway authorities and no specific changes in the highway system in the area are contemplated within the next 5 to 10 years.

Applicant also cites the decision in *St. Louis S. W. Ry. Co. of Texas Abandonment*, 290 I.C.C. 53, where the line to be abandoned was a branch line handling a substantial amount of bridge traffic which could be handled over an alternate route. Rehabilitation expenses were shown to be $881,000, and the net gain to the St. Louis Southwestern system would be $147,000 annually, should the line be abandoned. In authorizing the abandonment, it was pointed out that little use had been made of the line at the local stations thereon; that the bridge traffic could be handled just as efficiently and more economically over an alternate route; that no substantial immediate injury would be occasioned to shippers; that intermediate stations on the branch did not furnish sufficient traffic to permit profitable operation of the line; and that the system revenues therefrom were hardly more than past expenditures for maintenance of the line.

The facts in the instant proceeding are distinguished from those set forth in the above case. The segment herein proposed to be abandoned is a portion of the applicant's main line. Shippers located thereon, south of the tunnel, since its collapse have had their daily rail service decreased. Their all-rail route to and from northern and eastern points is cut off, and they are faced with the necessity of utilizing truck transportation which, as to certain commodities, involve higher costs with less satisfactory handling of traffic. Shippers located north of the tunnel, although not opposing the abandonment, will be deprived of rail service to points on the line south of the tunnel and of the more direct and faster route to Richmond. These adverse effects preclude us from finding that no substantial immediate injury will be occasioned to shippers by the abandonment.

The original route via the tunnel is 17 miles from Ignacio to Tiburon and approximately 6 miles via ferry to Richmond or a total of 23 miles. The proposed alternate route, over which traffic north of the tunnel is presently moving, via Ignacio, Schellville, and Fairfield to Richmond, is 79 miles and thus approximately 240 percent more circuitous than the route via the tunnel and ferry. This alternate route has always been available to shippers on applicant's line. However, out of 15,095 carload shipments handled by applicant in 1959 between main line points south of the tunnel (including San Francisco) on the one hand, and main line and branch points north of the tunnel on the other, some 10,024 carloads were interchanged at Tiburon. In 1960, 7,948 out of 12,124 cars used the Tiburon gateway and for the first 5 months of 1961, 3,324 out of 5,117 cars used that point of interchange. Obviously, the cars routed via the Tiburon gateway would not have moved over that route unless it was the most efficient route for those particular cars. The substantial number of cars that utilized the Tiburon gateway in the 2 years and 5 months prior to the fire and the circuity of the alternate route to the San Francisco area convinces us that the traffic involved cannot be handled as

efficiently via the alternate route as by way of the Tiburon gateway.

The Supreme Court in *Colorado* v. *United States*, 271 U.S. 153, said:

> The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both. • • • The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. [Page 168]

We have here a main line of railroad which, prior to its broken continuity was conceded to be profitably operated and there is no evidence of record to indicate that the line cannot continue to be operated at a profit should continuity be reestablished. During 1959, 1960, and the first 5 months of 1961, the applicant derived net railway operating incomes from operation of the line of $1,272,231, $272,269, and $261,287, respectively. The net operating income received for the first 5 months of 1961, if projected over a period of the entire year would be approximately $627,084 or an increase in net railway operating income over 1960 of approximately $354,815. This fact certainly is an indication that the need for transportation in the area is not undergoing an immediate decline. On the other hand, computations disclose that had the same facts existed during those three periods as at the present time and the alternate route utilized, the applicant would have suffered decreases in its net revenues for those periods of $156,819, $101,656, and $38,478.

We have held in a similar case involving this same applicant that costs for reconstruction of a tunnel or at least a major portion thereof can be treated as capital expenditures and therefore amortized over a reasonable period. See *Northwestern Pacific R. Co. Abandonment*, 312 I.C.C. 783.

Under the circumstances described, if the applicant were an independent carrier it would not be difficult to justify a denial. As stated, however, it is a member of the Southern Pacific System and as such, consideration must be given to the argument that while the applicant's revenue position in 1959, 1960, and the first 5 months of 1961 would have been adversely affected had the tunnel been closed, the combined revenues of the applicant and its parent would have been improved to such a degree that the system would have derived incomes exceeding the revenue decreases of the applicant. Although, as previously stated, the Southern Pacific System's income, as a result of the abandonment would be increased by $58,265, $33,722, and $21,476 for the described periods, the applicant in many instances will receive a lower division of the joint rate established via the alternate route than it enjoyed when interchanging with the Santa Fe at Tiburon. Thus a portion of the increased revenues to be enjoyed by the Southern Pacific is derived at the expense of another member of its system. It is quite apparent also that the major portion of the increased revenues will be derived from the substitution of the Southern Pacific's participation in the traffic for that of the Santa Fe.

We agree with the hearing examiner's conclusion that the Southern Pacific's anticipated increase in gross revenues as a result of the proposed abandonment would not exceed the sum of the anticipated decrease in applicant's revenues and the loss of estimated revenues by the Santa Fe, as set forth in the recommended report, the net effect being that the three rail carriers as a group would not realize a net gain therefrom and the shipping public would derive fewer benefits.

Upon consideration of all the evidence of record we are not convinced that the benefits to the applicant and the Southern Pacific from the proposed abandonment through increased system revenues and avoidance of capital expenditures would outweigh the adverse effects which will be suffered by the shipping public should the application be granted. From a review of applicant's past operations and the financial results therefrom, it can reasonably be predict-

ed that a marginal operation will not result from restoration of the tunnel and through service. We conclude, from the record before us, that the area has in the past and will in the foreseeable future generate sufficient traffic and revenues to support the restoration program and the continued through service. Reconstruction of the tunnel will not result in an undue burden upon interstate commerce or upon applicant. When the question to be resolved is a matter of only the degree of profits by the railroads on the one hand as against a loss by the shipping public through fewer facilities for rail transportation and a less efficient, slower service, it must be resolved in favor of the public. The application is denied.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 22nd day of May A.D. 1963.

Finance Docket No. 21725

NORTHWESTERN PACIFIC RAILROAD COMPANY
ABANDONMENT BETWEEN SAN RAFAEL AND FORBES OVERHEAD (PUERTO SUELLO TUNNEL), MARIN COUNTY, CALIF.

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said Division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the hearing examiner, are hereby referred to and made a part hereof:

It is ordered, That the application of the Northwestern Pacific Railroad Company to abandon that portion of its main line in Marin County, Calif., described in the reports aforesaid, be, and it is hereby, denied.

By the Commission, Division 3.

(SEAL)

HAROLD D. McCOY,
Secretary.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Served September 17, 1962

FINANCE DOCKET No. 21725

NORTHWESTERN PACIFIC RAILROAD COMPANY—ABANDONMENT BETWEEN SAN RAFAEL AND FORBES OVERHEAD (PUERTO SUELLO TUNNEL), MARIN COUNTY, CALIF.

Decided.....

Public convenience and necessity found not shown to permit abandonment by Northwestern Pacific Railroad Company applicant of portion of its main line of railroad in and north of San Rafael, Marin County, Calif. Application denied.

Randolph Karr and *Harold S. Lentz* for applicant.

William M. Bennett, Hector Anninos, Donald B. Day, Boris H. Lakusta, E. Myron Bull, Frederick G. Pfrommer, William V. Ellis, E. A. McMillan, Leonard M. Wickliffe, Charles R. McGowan, James J. Corcoran, J. G. Black, and *J. E. Howe* for protestants.

Wallace L. Kaapke, Noel Dyer, Malcolm Barrett, Marvin J. Colangelo, Robert M. Iric, E. Warren McGuire, and *Warren P. Marsden* for interested parties.

REPORT AND ORDER

Recommended by F. Roy Linn, Hearing Examiner

By application filed August 21, 1961, Northwestern Pacific Railroad Company seeks a certificate that the present or future public convenience and necessity permit abandonment of the portion of its main line between Milepost 17.068 at San Rafael and Milepost 19.533, near Forbes Overhead, in Marin County, Calif. Protests were filed and

the application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held at San Francisco, Calif., January 25, March 22, 23, 29, and 30, and June 4 to 8, 1962, since which time the parties have filed briefs. The application is opposed by the State and Public Utilities Commission of California, Cities of San Rafael, San Anselmo, Fairfax, and Sausalito, Calif., County of Marin, Marin Industrial Development Foundation, eleven shippers, The Atchison, Topeka & Santa Fe Railway Company, and seven railway labor organizations. Appearances as interested parties were entered on behalf of Bay Area Rapid Transit District, Garcia Traffic Service, United Vintners, Inc., County Council of Marin County, and the California Department of Public Works.

The portion of the line proposed to be abandoned by applicant, hereinafter sometimes called NWP, extends from a point within the corporate limits of San Rafael to Forbes Overhead, a distance of 2.465 miles. The request for authority to abandon the described mileage was occasioned by major damage by fire to and partial collapse of applicant's Tunnel No. 4, known as Puerto Suello Tunnel, which except for its northern portal is located within the corporate limits of San Rafael, population 20,460. As applicant's line in the involved area is built in a pass through a series of hills, relocation is not feasible and, if service is to be resumed, the restoration of the tunnel will be necessary.

On brief, applicant urges that neither present nor future public convenience and necessity require continuance of the rail mileage in question, arguing among other things that rail business in the area has been decreasing and can be expected to decline in the future; that rail service will continue to exist in the area even though the involved mileage is abandoned; and that the expense of rebuilding the tunnel is not justified. Protestants contend in part that NWP will be financially better off by restoring the tunnel and operating through it; that the shipping public now needs, and in the future in even greater degree will need

the direct, daily rail service which existed before the tunnel collapse; that, although it ostensibly seeks only to avoid certain expense in connection with rebuilding of the tunnel, the necessary effect of the application is to cancel many through routes of long standing having substantial use and to divert traffic from protestant Santa Fe to applicant's parent, Southern Pacific Company; and that applicant has not sustained its burden of proving that public convenience and necessity permit the proposed abandonment.

Applicant operates lines of railroad between Tiburon and Sausalito, Calif., located on the nothern shoreline of San Francisco Bay, on the one hand, and, on the other, Eureka and Areata, Calif. Its main line generally parallels the Pacific Coast from Tiburon via Detour, San Rafael, Ignacio, and various other intermediate points to Eureka, 276 miles. The distances from Tiburon to Detour, San Rafael, and Ignacio are 6, 9, and 17 miles, respectively. Branch lines are operated from Detour to Sausalito, 7 miles, and from Ignacio to Schellville, 45 miles, connection being made at Schellville with the rail lines of Southern Pacific Company. Interchange of traffic is effected at Tiburon with protestant Santa Fe, which operates a car-ferry service across San Francisco Bay between Tiburon and Richmond, the latter being one of the San Francisco Bay termini of protestant's rail lines. Applicant treats San Francisco as one of its main line points and interchanges traffic thereat with Southern Pacific Company. The physical transfer across San Francisco Bay between Tiburon and San Francisco is accomplished in the car-ferry equipment operated by protestant Santa Fe on a contractual arrangement other than participation in joint rates. Applicant's capital stock is owned by Southern Pacific Company. See *Control of Northwestern P. R. Co.*, 150 I.C.C. 119.

Puerto Suello Tunnel is 1357.6 feet in length and as of the time of the fire July 29, 1961, was lined with and supported by redwood timbers, except for concrete construction of

91.6 feet at the southern portal and 18.2 feet at the northern portal.[1] About 3:30 o'clock P.M. on the date mentioned, two NWP bridge and building employees traveling by motor car entered the tunnel and midway thereof discovered fires between the rails and along and behind the walls of the tunnel. Although city and county fire departments were called, the fires could not be extinguished and continued to burn over a period of several hours, causing the death of one fireman. The fires are said to have been started by two minors who were found within the tunnel by the two NWP employees.

In the early course of the fire, the air draft from north to south generated by the 1.19 percent grade of the tunnel caused a rapid burning of the timbers in the southern half of the tunnel. When a cavein occurred near the southern portal, the fire spread toward the northern portal, burning areas having been observed within 75 to 100 feet of such portal. Due to the caveins at both portals, no one has been able to inspect the interior of the tunnel. Upon all the evidence, however, there appears to be little doubt that timbers, particularly the overhead timbers, throughout most of the tunnel were destroyed or damaged and that with the resulting loss of support varying amounts of dirt and rock throughout the length of the tunnel bore may have dropped into the bore. As stated above, the tunnel is completely blocked at both portals. It also appears that temperatures generated by the fire may have caused twisting and warping of individual rail sections within the tunnel creating a hindrance to reconstruction or repair operations.

Both applicant and certain protestants conducted studies with a view to arriving at the costs which would be incurred in reconstructing the tunnel. Applicant expresses the opin-

[1] The profile of the ground line above the tunnel ascends gradually from approximately 15 feet above the southern portal to about 71 feet above top of rail at a point 540 feet from the southern portal. Beyond such point, Puerto Suello Hill sharply rises to peak, some 220 feet above rail, before sloping downward for the remaining 400 feet, horizontal distance, to the northern portal.

ion that the most economical plan of restoration is retimbering but it argues that a timber-lined tunnel is unsatisfactory because of the fire hazard and the difficulty of obtaining timbers such as were used in the original and subsequent construction of the tunnel. It takes the position that, if reconstruction is undertaken, a reinforced concrete lined tunnel should be built. Its plan of reconstruction would be divided into three separate steps, one step to consist of the rebuilding of the 449 foot collapsed section of the tunnel near the south portal by cut and cover methods, another to include the redriving of the 162 foot collapsed section at the northern portal, and the third to embrace the removal of earth and debris and installation of reinforced concrete lining in the remaining 636.8 foot portion of the tunnel. Applicant estimates that cost aggregating $851,665 will be incurred in reopening and reconstructing the tunnel in the manner described. It obtained a bid in writing by one contractor of $1,212,625 and an oral bid by another of $906,540 for reconstruction of the tunnel, but indicates that the bids, as such, were not firm offers as both contractors explained that the work would have to be done on a cost-plus basis due to the unknown factors involved. Although not introduced in evidence, the witness for applicant also had prepared estimates indicating that cost of $763,000 would be incurred in reconstruction of the tunnel using redwood timbers in lieu of reinforced concrete and employing the operating methods above outlined. Protestants' estimates do not differ with those of applicant in such degree as to require specific discussion thereof.

Prior to the tunnel fire, freight service six days a week was maintained by NWP for traffic moving between main line points south of the tunnel, on the one hand, and, on the other, points north thereof, and for traffic moving from and to both Tiburon and Schellville. Using a tug and float accommodating about 13 rail cars, protestant Santa Fe operated a car ferry service six days a week between Tiburon, on the one hand, and, on the other, connections with its rail

lines at Richmond. Freight service at points on applicant's Sausalito branch was provided three days a week. All passenger service over applicant's lines was discontinued in 1958.

Since the fire, rail freight service between points south of the tunnel, on the one hand, and, on the other, points north thereof, including Schellville, has been discontinued. Rail service between points south of the tunnel is now operated only Tuesdays and Fridays. The car ferry service of protestant Santa Fe has been reduced to operation two days a week, Mondays and Thursdays, arriving at Tiburon about 11 o'clock A.M. on each of such days. Interstate traffic moving to or from NWP points north of the tunnel is interchanged by NWP and SP at Schellville, the routing via Santa Fe to and from Tiburon not now being available for such traffic.

Freight traffic handled by NWP between main line points south of the Puerto Suello Tunnel, including San Francisco, on the one hand, and, one the other, main line and branch points north of the tunnel, consisted in 1959 of 15,095 carload shipments and 3,085 tons of less-than-carload shipments producing revenues of $1,848,249; in 1960 of 12,124 carload shipments and 2,406 tons of less-than-carload shipments, producing $1,565,106; and in the first 5 months of 1961, of 5,117 carload shipments and 604 tons of less-than-carload shipments with revenues therefrom of $678,178.[2] The less-than-carload traffic was handled in substituted truck service and small percentages of the carload traffic, 77 carloads in the first 5 months of 1961, were moved in highway trailers on the highway as part of trailer-on-flatcar movements. The volumes outlined above do not include traffic moving between points on the Sausalito Branch and points north of the tunnel amounting to 291 cars in 1959; 422 cars in 1960; and 149 cars in the first 5 months of 1961.

[2] NWP railway operating revenues from system operations were $13,898,777 in 1959; $11,408,354 in 1960; and $4,339,250 in the first 5 months in 1961.

The traffic above described as having been handled between main line points consisted chiefly of lumber and other products of forests, 5,882 cars in 1959 and 3,473 cars in 1960; pulpwood, chips and logs, 3,709 cars in 1959 and 3,923 cars in 1960; and rock, sand, and gravel, 3,292 cars in 1959 and 2,675 cars in 1960. Other commodities moving in volumes exceeding 100 cars included automobiles, animal and poultry feed, grain and grain products, liquors, wines, and wallboard and plasterboard.

Of the 15,095 carload shipments above shown as having been handled by NWP in 1959, some 10,024 shipments aggregating 418,972 tons of freight were interchanged at Tiburon with protestant Santa Fe, most of which were originated at or destined to points north of Puerto Suello Tunnel. The traffic originated or terminated by NWP at its main line points south of the tunnel in the same year aggregated 4,616 carload shipments, including local shipments and shipments moved to and from interchange at Schellville and Tiburon. Since the tunnel fire, interstate traffic originated at or destined to points north of the tunnel has been interchanged with Southern Pacific at Schellville, and traffic originated at or destined to points south of the tunnel has been interchanged with Southern Pacific at San Francisco or Santa Fe at Tiburon. In the five months ended December 31, 1960, prior to the tunnel fire, 3,392 carload shipments were interchanged at Tiburon, of which 3,107 cars were delivered to Santa Fe and 285 were received. In the five months ended December 31, 1961, NWP delivered 75 cars to Santa Fe at Tiburon and received 41 for a total of 116 car-load shipments. Revenues accruing to Santa Fe on traffic moving via Tiburon declined from $700,155 for the first period to $36,972 in the second.

With abandonment of the tunnel, NWP anticipates permanent loss of certain traffic, principally lumber, rock, sand, and gravel moving locally. The carload traffic which will be lost as a result of abandonment produced revenues of $262,080 in 1959; $208,777 in 1960; and $91,235 in the first

5 months of 1961. In the making of joint rates with Southern Pacific with interchange at Schellville, NWP in certain instances receives divisions somewhat lower than those received from joint rates on traffic interchanged with Santa Fe at Tiburon. If the traffic interchanged with Santa Fe at Tiburon in 1959, 1960, and the first 5 months of 1961, had been interchanged with Southern Pacific at Schellville, the carload freight revenues of NWP in the three periods would have been reduced in the amounts of $169,544, $137,816, and $56,363. The sums of the two foregoing items for each of the three periods, $431,624, $346,593, and $147,598, reflect the decrease in revenues which NWP would have experienced if the tunnel had been closed during 1959, 1960, and the first 5 months of 1961. When such decreases in revenues are offset by the costs which have been incurred in moving the lumber, rock, sand, and gravel expected to be lost, by estimated reductions in expenses to be realized in handling traffic via Schellville, and by the expenses assigned to operation of the portion of line to be abandoned, NWP calculates that its net decreases in revenues if the tunnel had been closed in the described periods would have been $209,930, $154,570, and $60,476. Further offsetting the decreases in revenues by certain railway tax accruals and annual interest of 5 percent on certain capital costs allegedly avoidable by abandonment, it arrives at the somewhat smaller net decreases of $156,819, $101,656[3], and $38,478.

While the revenue position of NWP in 1959, 1960, and the first 5 months of 1961 would have been adversely affected if the tunnel had been closed during such periods and apparently would be similarly affected in the future as a result of the proposed abandonment, it is contended that upon abandonment of the tunnel the combined revenues of NWP and its parent, Southern Pacific Company, will be improved in such degree as to make the abandonment a profitable undertaking for the system. The disruption of the through

[3] In 1960, the last full year of operation prior to the tunnel fire, NWP had total net railway operating income from its entire line of $272,269.

routes via Tiburon and the corresponding necessity for routing via Schellville assures participation by Southern Pacific Company in all traffic moving by railroad to and from points north of the tunnel, and had this condition existed in 1959, 1960, and the first 5 months of 1961, that carrier would have enjoyed increases in revenues of $602,088, $469,570, and $200,823, with estimated net railway operating income of $268,195, $188,282, and $81,952. Such nets would have exceeded the revenue decreases suffered by NWP and would have resulted in increases in system net income for the three periods of $111,376, $86,636, and $43,474, provided the tax accruals and interest mentioned above are taken into account in computing NWP revenue decreases. Computed independently of the tax accruals and interest, the system gains in net income for the three periods would have been $58,265, $33,722, and $21,476. The latter method of calculating the system gains appears to reflect agreement with the findings of the Commission in prior proceedings. Compare Finance Docket No. 20900 *Northwestern Pacific Railroad Company Abandonment (Portion) Bausalito Branch in Marin County, Calif.*, decided January 24, 1962.

With the handling by Southern Pacific via Schellville of all traffic moving from and to NWP points north of the tunnel, the shippers would be able to route traffic in the line-haul service of Santa Fe beyond Stockton, Fresno, or Bakersfield, Calif. Upon basis of figures for 1959 traffic, the disruption of the through route via Tiburon will result in loss to Santa Fe of divisions aggregating $532,544. As the frequency of Santa Fe schedules to and from its rail terminus at Richmond is not dictated alone by the amount of the Tiburon interchange, there would be little saving of rail costs, but it is estimated that reduction in the frequency of car ferry service between Richmond and Tiburon would produce savings of about $20,000 a year. Shippers obtained faster service for certain traffic when the Tiburon route was specified and on that account such route was used even though the rates sometimes were lower via Schellville. In

one test period, July and October, 1960, and January and April, 1961, some 129 out of 716 carload shipments routed via Tiburon could have been routed via Schellville at lower transportation costs.

Applicant argues that the position of protestant Santa Fe is untenable and cites *Western Pac. R. Co.* v. *Northwestern Pac. R. Co.*, 191 I.C.C. 127, wherein the Commission in exercising its jurisdiction under section 15(4) of the act to prescribe through routes found in part that Northwestern Pacific and Southern Pacific must be treated as a single line for rate-making purposes, and that as a single unit they are entitled to their long-haul under section 15(4). The validity of the described finding apparently has not been challenged in the past as indicated by the condition above mentioned in which NWP and Southern Pacific on some occasions have established rates via Schellville lower than the NWP-Santa Fe rates via Tiburon. Insofar as the instant proceeding is concerned, however, it is clear that the issue requiring consideration are those specified in section 1(18 to 21) of the act which as pertinent herein relates to the public convenience and necessity in respect of a proposed abandonment. Although not of controlling importance herein, it may be noticed that the cited decision contains reference to provisions of the act making it the duty of common carriers by railroad to establish through routes and just and reasonable rates applicable thereto, and to provide reasonable facilities for operating through routes, and further refers to the proceeding in which Southern Pacific acquired entire control of NWP wherein there was disclaimed any intention of disturbing any through rates then applying via the Santa Fe or taking any step, as a result of single ownership, which could affect the public adversely.

Applicant undertakes to show that several motor carriers hold authority to conduct operations in the area. There is no competent evidence however, that any of such carriers, with the exception of Pacific Motor Trucking Company, a subsidiary of Southern Pacific Company, in fact has available

facilities and is ready and willing to provide reasonably adequate transportation service for any of the rail traffic in issue. NWP and Pacific Motor Trucking Company have established a joint rate or rates for the transportation of lumber but have not moved any traffic thereunder. The protesting shippers have used motor carrier service to some extent since the closing of the tunnel and have found such service fails to afford certain advantages enjoyed in the use of rail service. The protesting shippers regard the rail service as having been satisfactory prior to closing of the tunnel, but since that time have experienced reduction from daily to twice-weekly service with accompanying fluctuations in transit time, bunching of deliveries, and other inconveniences. They have suffered complete loss of rail service to and from Schellville and other NWP points north of the tunnel necessitating attempts to use truck transportation which as to certain commodities involves higher costs with less satisfactory handling of the traffic.

Claim is made by applicant that the area between San Rafael and Tiburon has little, if any, future industrial potential and that freight traffic has declined in recent years in line with tendency of the area to become residential and commercial. Carload freight traffic originated or terminated by NWP at main line points in the 10-year period from 1951 to 1960, inclusive, amounted to 5,626 cars in 1951; 5,089 in 1952; 5,457 in 1953; 5,860 in 1954; 7,068 in 1955; 8,085 in 1956; 5,917 in 1957; 5,107 in 1958; 4,616 in 1959; and 3,788 in 1960. The volume in 1960 obviously is the lowest for any year of the period, but the traffic handled as late as 1958 did not appreciably differ from the volume for 1952. Protestants introduced studies reflecting a 9.9 percent population increase in Marin County since the 1960 census, a 29.3 percent increase in number of manufacturing establishments in 1960 over 1955, and increases in various other respects, except agricultural production which declined a fraction of one percent. NWP had net railway operating income of $649,374 in 1956; $532,441 in 1957; $712,505 in 1958; $1,272,

231 in 1959; $272,269 in 1960; and $261,287 in the first 5 months of 1961: The net for the 5-month period suggests a possibility of improved conditions along NWP lines, and in conjunction with the studies by protestants tends to support the conclusion that need for transportation service, including rail service, is not undergoing an immediate and catastrophic decline. It also should be kept in mind that the effects of the proposed abandonment will not be confined to the main line points of San Rafael to Tiburon, inclusive.

Question is raised as to whether applicant has understated the losses it would suffer as a result of the proposed abandonment, particularly as to the costs it would incur in making the tunnel safe for abandonment. Estimates for this purpose vary from $25,000 to $300,000 depending upon whether the necessary work will consist of plugging the south portal to prevent subsidence or the filling with gravel or sand of the entire tunnel bore by the process of drilling pour holes from above and compacting the gravel or sand in the bore under pressure. Whether resolved upon basis of the lower or higher estimate, the result would not lend support for the abandonment proposal.

Issues are presented as to the type of construction which should be employed in any restoration of the tunnel and whether the costs of any reconstruction or repair items properly may be treated by NWP as operating expense as distinguished from capital expenditure. The retimbering of the tunnel will afford to applicant a unit of property with a life of many years and any decision to install a more permanent unit is a matter for management. If the entire lining of the tunnel, including portals, is replaced, none of the cost with the possible exception of that for cleanup operations such as the removing of the old timbering would appear to constitute an operating expense. If, upon inspection of the interior of the tunnel, it should be determined that a portion or portions of the tunnel lining do not have to be rebuilt, it may be possible that replacement in kind of burned out sections would be chargeable to operating expense. For the

reasons hereinbefore stated, however, there is reason to believe the tunnel lining was damaged throughout the entire length thereof and the findings accordingly are made with the view that restoration will involve relining of the tunnel bore in its entirety.

Consistently with *Parcell* v. *United States*, 315 U.S. 381, any costs that will be incurred in event abandonment is not permitted by the Commission must be taken into account. There is some evidence tending to show that continued operation by NWP of the involved portion of its line will give rise to additional highway construction costs if and when U.S. Highway 101, which generally parallels the right-of-way, is widened or relocated. There is no indication that highway authorities have ordered or approved any specific changes in the highway system in the area and such changes as ultimately may be made admittedly are five to ten years away. The adoption herein of any definite cost figures in respect to possible future highway construction accordingly is not warranted.

Upon consummation of the proposed abandonment, rail transportation service between NWP points south of the tunnel, on the one hand, and, on the other, interstate and intrastate points on the lines of other railroads would be confined to routes via Tiburon. Rail service between NWP points north of the tunnel and points on the lines of other railroads would be confined to the one route via Schellville. Local service between NWP points would be divided into two segments, one north of the tunnel and the other south thereof. With restoration of the tunnel, there will continue to be available as to all NWP points the through routes via both Schellville and Tiburon and the breaking of applicant's main line at the tunnel will be avoided. NWP apparently is able, financially and otherwise, to restore the tunnel, and upon basis of its own revenue and expense figures will realize net revenues from continued operation through the tunnel that will justify reconstruction of the tunnel and the

resumption of service through it. Clearly, no burden upon interstate commerce will result from reopening of the tunnel when the matter is considered from the standpoint of NWP as an individual corporate entity. The through route maintained by NWP and Santa Fe via Tiburon reflects a material and valuable contribution to the interstate and intrastate transportation system in the area. It is demonstrated that such system is capable of affording daily service by railroad at NWP main line points when both of the major roads connecting with NWP have opportunity to compete for the involved traffic. The collapse of the tunnel already has forced service curtailments at points south of the tunnel with a resumption of daily service apparently dependent upon whether the traffic flow which formerly obtained via Tiburon can be reactivated. Failure in this respect, aside from inability to restore daily service, also renders possible further deterioration in service. As argued by certain protestants, accomplishment of the proposal would leave south of the tunnel site an uneconomic "island" system with limited, roundabout and unsatisfactory access by water only, which most assuredly would be expected to deteriorate further, both physically and in financial results until it becomes itself a burden upon interstate commerce and a legitimate candidate for abandonment. The beneficiary of the abandonment apparently would be applicant's stockholder and connecting carrier, Southern Pacific Company, who would realize as its principal benefit the liquidation or diminution of carrier competition. It further appears that the increase in gross revenues likely to accrue to Southern Pacific Company as a result of the proposed abandonment would not exceed the sum of the anticipated decrease in revenues by NWP and the estimated loss in revenues by Santa Fe, the effects being that the carriers serving the area would not as a group realize any net gain and the shipping public would be left with fewer facilities for rail transportation and materially less efficient and less frequent service.

ULTIMATE FINDINGS AND ORDER

The examiner finds that the present and future public convenience ~~and necessity~~ are not shown to permit abandonment by the Northwestern Pacific Railroad Company of the line of railroad previously described, and that the application should be denied.

Premises considered, it is the order of the examiner that:

The application of Northwestern Pacific Railroad Company for a certificate permitting it to abandon that portion of its main line extending from Milepost 17.068 at San Rafael to Milepost 19.553 near Forbes Overhead, in Marin County, Calif., be, and it is hereby denied, effective on the date of service of a notice or order stating this recommended order has become the order of the Commission.

By the Commission, F. Roy Linn, Hearing Examiner.

Dated at Washington, D. C., this 12th day of September, A.D. 1962.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX D

Interstate Commerce Act
Section 1 (18) to (21), inclusive

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as

hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as

a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.